

No. 14,994

IN THE

United States Court of Appeals  
For the Ninth Circuit

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JOHN E. KIRBY,

*Appellant,*

VS.

PAUL J. MADIGAN, Warden, United States  
Penitentiary, Alcatraz, California,

*Appellee.*

BRIEF FOR APPELLEE.

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**BRIEF FOR APPELLEE.**

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**JURISDICTION.**

Jurisdiction is conferred on this Court by Sections 2241 and 2253 of Title 28 United States Code.

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**STATEMENT OF THE CASE.**

Appellant is a prisoner at the United States Penitentiary at Alcatraz, California (R. 10). He is serving a term of nine years which commenced on November 24, 1948 (R. 12). Good time credits were withheld from appellant pursuant to Section 4161 of Title 18 United States Code on two occasions (R. 13-14).

In connection with the first withholding of good time, appellant was served with the following notice:

“Notice of Withholding of Good Time. To John E. Kirby, No. 950-AZ. Pursuant to authorization and instructions of the Director of the Bureau of Prisons and in accordance with the regulations of the Bureau, governing the withholding of good time, a special sub-committee was appointed by the Warden for the purpose of investigating your failure to earn statutory good time, by your conduct as follows: Subject assigned at his own request to the barber in Jan. 1952. On Feb. 7, 1952, he quit his job, even though the institution is short handed and in need of barbers. The Committee has recommended that good time be withheld each month, until such time, as subject requests and is permitted to return to his assignment and is released from segregation.” (R. 13-14.)

Appellant’s good time was withheld from March, 1952 until March, 1953 (R. 13).

On the second occasion appellant was deprived of good time from May, 1953 to April, 1955 for “Participating in a rebellious demonstration with other prisoners, in creating a serious disturbance, refusing to work and agitating other inmates to stop work and join in yelling and defying institutional authority during the month of May, 1953;” (R. 14). Appellant’s version of his refusal to work was that “he did not desire to continue his duties as a barber; that such was not to the best interests of your petitioner due to his lack of physical well being at that time;

that his conduct in said capacity was exemplary; that his continuance in said capacity was not to the best interests of the institution; and that he desired, as soon as it could be most conveniently arranged, for the mutual benefit of all parties involved, work of some other nature commensurate with his physical ability and well being.” (R. 15). Appellant was placed in confinement on the basis of his refusal to work (R. 15). He alleges that he informed the prison authorities that he desired work “commensurate with his ability to perform such;” (R. 15). The prison authorities determined that appellant was responsible for a “disturbance” and placed him in solitary confinement from May, 1953 until April, 1955 (R. 16).

Appellant admits that two prior applications for a writ of habeas corpus were denied by United States District Judge Louis E. Goodman (R. 7). In the instant case the record shows that a prior application for the writ was denied on August 22, 1955 by Judge Goodman (R. 3), and subsequently appellant applied for a writ of habeas corpus to Chief Judge William Denman of this Court (R. 4). On September 13, 1955 Chief Judge Denman transferred the petition to the District Court (R. 2). On September 22, 1955 United States District Judge George B. Harris denied the petition on the ground that there were no additional facts in the petition which would warrant the Court making a ruling different than that made by Judge Goodman on August 22, 1955 (R. 3). On September 26, 1955 appellant filed a sup-

plement to his petition for habeas corpus alleging that his good time was "forfeited" contrary to the provisions of Section 4165 of Title 18 United States Code. (R. 26). On September 28, 1955 Judge Harris issued an order to show cause (R. 34). On October 17, 1955 appellee moved to dismiss the petition on the grounds that it appeared on the face of appellant's petition that his record of conduct showed that he had not faithfully observed the rules of the United States Penitentiary at Alcatraz, California, and had been subjected to punishment and therefore, Section 4161 of Title 18 United States Code precluded the crediting of good time (R. 36). On November 3, 1955 Judge Harris dismissed the petition for habeas corpus and discharged the order to show cause (R. 41-42). Leave to appeal in forma pauperis was granted on November 14, 1955 (R. 44). Appeal was then taken to this Court (R. 40).

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**OPINION OF THE COURT.**

*“Order Dismissing Petition for Writ*

“Petitioner, confined at Alcatraz, seeks his release on the grounds that he has completed service of his sentence. He contends that respondent has deprived him of good time in violation of the requirements for forfeiture set forth in 18 U.S.C.A. 4165.

“The short answer to petitioner's contention is found in 18 U.S.C.A. 4161. This section sets forth the conditions under which a prisoner may earn good time. When he has been placed in



confinement for failure to comply with the rules of the institution, he is ineligible to earn good time during the period of confinement.

“IT IS ORDERED that the petition for writ of habeas corpus be, and the same hereby is, DISMISSED AND THE Order to Show Cause be, and the same hereby is, DISCHARGED.

“Dated: Nov. 3, 1955.

“/s/ GEORGE B. HARRIS  
United States District Judge”

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**STATUTES INVOLVED.**

*Title 18 United States Code, Section 4161:*

*Section 4161. Computation generally.*

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, *whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, to be credited as earned and computed monthly as follows:*

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed. (Emphasis added.)

*Title 18 United States Code, Section 4165:*

*Section 4165. Forfeiture for offense.*

If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time may be forfeited.

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**QUESTION PRESENTED.**

Is the withholding of good time credits governed by Section 4165 or Section 4161 of Title 18 United States Code?

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**ARGUMENT.**

**THE COURT SHOULD NOT INTERFERE WITH PRISON  
DISCIPLINARY MATTERS.**

Appellant has been subjected to punishment, and his record of conduct shows that he has not faithfully observed the rules of Alcatraz Penitentiary. It is his contention that he was justified in so doing. He denies that he was responsible for the riot which resulted in his confinement and the withholding of

a portion of his good time, and he claims the right to refuse work unless he so desires. Appellant is asking this Court to review the administration of the discipline at the United States Penitentiary, Alcatraz, California. He desires the Court to make a determination of fact with respect to the truth of the disciplinary charges brought against him. He demands that the Court find and enforce a right on the part of penitentiary inmates not to work.

Judicial review of prison discipline would open a Pandora's box of difficulties for both the administration of the Courts and of the prison system. If the prisons are required to administer discipline through the forms and the standard of proof required for conviction in Federal District Court, the administration of penitentiaries will become impossible. Alcatraz Penitentiary is a maximum close security prison. It contains the most desperate elements of the United States penitentiary population. More than once during the last few years these men have erupted into violence. The protection of the the guards and their families on Alcatraz and, in the last analysis, the citizens of the San Francisco Bay Area, depends upon the continuation of strict and stern discipline at the prison. Discipline at Alcatraz may not be conducted in accordance with the rules that have obtained at a Boy Scout summer camp.

The Courts have universally agreed that it is not the function of United States Courts to superintend the discipline of prisoners in penitentiaries. *Stroud v. Swope*, 9th Cir. 1951, 187 F.2d 850, 852, see cases

cited Note 3, cert. denied; *Numer v. Miller*, 9th Cir. 1948, 165 F.2d 986; *Dayton v. Hunter*, 10th Cir. 1949, 176 F.2d 108, cert. denied; *Williams v. Steele*, 8th Cir. 1952, 194 F.2d 917; *Kemmerer v. Benson*, 6th Cir. 1948, 165 F.2d 702, cert. denied.

The control of federal penitentiaries is entrusted to the Attorney General and the Bureau of Prisons under Sections 4001 and 4042 of Title 18 United States Code. *Sturm v. McGrath*, 10th Cir. 1949, 177 F.2d 472; *Powell v. Hunt*, 10th Cir. 1949, 172 F.2d 330. See also *Ponzi v. Fessenden*, 258 U.S. 254.

Appellant argues that he must be present at any hearing in which his good time is withheld. He argues that his good time is his as a matter of right and may only be withheld under the regulations which have been enacted pursuant to Section 4165 of Title 18 United States Code. Credit for good conduct does not accrue until such credit has been completely earned. *Grant v. Hunter*, 10th Cir. 1948, 166 F.2d 673, 674 (see cases collected in Note 2).

In the instant case appellant has admittedly been subjected to punishment, and his record of conduct shows that he has not faithfully observed the rules of the institution. Appellant disputes the truth of that record. However, he does not deny that the record so shows. He has asked the District Court to go behind the record and make an independent examination of the incidents which resulted in his discipline. Section 4161 of Title 18 United States Code rather than Section 4165 of Title 18 United States Code governs the withholding of good time

credits. *Isenberg v. Pescor* (D.C.W.D. Mo. 1946), 68 F.Supp. 584.

Appellant could not be credited with good time because he had been subject to punishment and, furthermore, he had not observed the rules. It was not necessary to forfeit his good time since he had not as yet earned it. In the judgment of the prison officials he had engaged in a disturbance and had refused to work, both of which they determined violated the rules of the institution. The Court below refused to interfere with this administration of discipline by those charged with the administration of it. This judgment should be affirmed.

Dated, San Francisco, California,  
March 2, 1956.

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